station", it must retain the ability to measure the extent to which equal opportunity prevails in the industry. EEO data is essential "to show industry employment patterns and to raise appropriate questions as to the causes of such patterns." Nondiscrimination - 1971, 23 FCC2d at 431; see also Nondiscrimination - 1970, 23 FCC2d at 431. As the UCC III court pointed out, "[t]he FCC does not suggest in the present case that small station statistics are not still 'useful' for this purpose." UCC III, 560 F.2d at 534.

A thorough and accurate database is especially critical in light of the President's promise to terminate affirmative action programs once they have achieved their objectives. See Affirmative Action Address, p. 14. Industrywide statistics will continue to be necessary to inform the Commission whether its program is achieving its objectives and when it may be redesigned or terminated.

3. It is not true that "EEO programs serve little purpose for small stations"

Recalling the history of the EEO Rule, Commissioner Hooks noted that "it is vitally important to have the full participation of the small stations as well as the large because it is natural that the smaller stations serve as a training ground for aspirants in this industry. Hence, consciousness and responsiveness at that level was felt to be of special importance." Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting Statement of Commissioner Benjamin L. Hooks). Commissioner Barrett agreed:

> We cannot underestimate the importance of "small" stations for minority and female applicants' initial entry into the communications industry. Though some station owners argue that they are unable to attract or retain minorities and women because of higher salaries and opportunities offered by their larger competitors, I would argue that applicants, no matter their sex, race or ethnicity, often turn to smaller stations to acquire experience that they need to compete for employment at larger stations. Yet, all too often, I hear from those who have diligently sought employment at broadcast stations, only to be told that they lack the requisite experience. This highlights the "Catch 22" that many minorities and women face when seeking employment with broadcast stations.

NPRM, 11 FCC Rcd at 5171 (Separate Statement of Commissioner Andrew C. Barrett).

Commissioners Hooks and Barrett are correct. The Tennessee Study observed that turnover rate is negatively correlated with staff size -- meaning that smaller stations tend to turn over employees faster than larger stations. See pp. 48-49 supra.[109/] The higher turnover rate of smaller stations also illustrates that these stations are often a point of entry from which newcomers to the industry advance to larger stations as they develop their careers.

Indeed, the entry level status of many smaller stations' employees further underscores the heightened importance of EEO review of smaller stations. Entry level employees' relative lack of job experience and financial resources renders them uncommonly

---

109/ This point did not escape the UCC III court either, which observed that stations with fewer than ten employees, with 15.1% of the jobs, had 32% of the job opportunities and 41.7% of the entry-level job opportunities. The court noted that "due to higher turnover and a greater willingness to hire inexperienced personnel, the small stations have more entry-level jobs...than their total employee strength indicates." Id., 560 F.2d at 535.

vulnerable to discrimination. Thus, entry level employees especially need EEO protection -- which only the FCC can provide, owing to the EEOC's 15-employee jurisdictional limit.110/ It is especially unfortunate -- indeed, ironic -- that the stations the Commission proposes to exempt from EEO scrutiny are the only stations whose employees are also unprotected by Title VII.

The UCC III court had little difficulty disposing of the argument that smaller stations do not need equal employment opportunity programs. The Court pointed out that "[n]o matter how informal a station's procedures, the requirement that it periodically think about its EEO efforts seems wholly reasonable." UCC III, 560 F.2d at 534.111/

Apart from whether circumstances have changed since 1976, EEO opponents cannot seriously contend that circumstances have materially changed since 1987. In that year, the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field." Broadcast EEO - 1987, 2 FCC Rcd at 3970 ¶22.

110/ The absence of EEOC jurisdiction over smaller stations leaves the FCC as the only line of antidiscrimation defense -- a fact expressly recognized by the FCC's 1978 agreement with the EEOC apportioning EEO jurisdiction between them. See Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC2d 2320, 2331, Appx. §III(a) (1978) ("FCC/EEOC Agreement").

111/ See also Nondiscrimination - 1971, 23 FCC2d at 433 (recognizing that EEO requirements could "be met by all stations, large or small, with reasonable good will.")

An EEO Program is fundamental to any station, especially a smaller one. A "small" station's broadcast license is exactly the same as the broadcast license held by a larger station. Its character requirements are the same as the character requirements of a larger station. And the audience certainly seldom knows the difference between a smaller station and a larger station, since they produce the same volume of product. Thus, an employee at a smaller station typically contributes to more hours per week of broadcast programming than her counterpart at a larger station. As such, the smaller station's employee has greater value in promoting diversity of viewpoints than her larger station counterpart.

Indeed, because of the growth of media concentration, a "small", non-superduopolized station has a heightened responsibility to be an alternative, independent voice. Thus, it is even more critical than it was before the age of superduopolies for these stations to practice equal opportunity.

4. Protection of some broadcast employees is no cause to leave others unprotected

In 1976, an increase in the station size cap from five to ten employees would have left 84.9% of the workforce still covered by the EEO Rule -- a fact which the UCC III court found "cannot in itself be a reason to change a policy that regulated an even greater percentage of the industry." Id., 560 F.2d at 535. The court held that the 84.9% number "is not as reassuring as it appears" because its change of threshold "more than doubles the number of exempted stations from 21.3% to 54% of all broadcast stations." Id.

The public is fortunate that the UCC III court did not permit the ten-employee cap in Nondiscrimination - 1976 to stand. Had it

done so, Catoctin would never have happened, and an intentional discriminator might have gone unpunished.112/

The contention that a regulatory exemption of a "small" firm is justified because larger firms are still regulated is illogical. Any beneficial effects of continued regulatory coverage of one entity do not replace the detrimental effects of noncoverage of another entity if the respective entities operate independently and serve independent groups of consumers.

Thus, the effect of a small entity exemption -- in broadcasting and in most businesses -- is a net decline in the level of consumer protection. For example, imagine the EPA proposing to "streamline" anti-pollution rules by allowing "small" oil refineries to pollute the groundwater, or the FDA proposing to allow "small" tobacco companies to spike cigarettes with nicotine. Imagine the FDA proposing to exempt small food processors from enforcement of the nutrient requirements in infant formulas.113/ We have seen what happened when the FAA allowed small airplanes to forego the safety requirements imposed on large passenger jets --

---

112/ To the argument that this was just one broadcaster, we answer that one is one too many. Furthermore, the prophylactic effect of one case on the rest of the industry inevitably prevented a considerable amount of discrimination at other stations, large and small.

We note that an increase in the station size cap could even immunize a station like the one in Beaumont, which fired virtually all of the Black employees attendant to a format change on the assumption that Blacks can't do anything but program Black music. If a station downsizes, and its downsizing brings it below the new station size cap, it would file no further Form 395's. Thus, even if the downsizing came about through termination of most of the minority employees, the public would never know.

113/ See 21 U.S.C. §350a(e) (1996) and 21 CFR §106.100 (1996).

small planes fell out of the sky and the rules were suspended.114/

Thus, the UCC III court was correct: the continued protection of some persons is no justification to deny civil rights protections to others.115/

Furthermore, quite apart from whether EEO coverage of some justifies noncoverage of others, the 1996 Commission -- unlike the 1976 Commission -- has absolutely no idea how many stations, and how many employees, would lose their EEO coverage under any of the proposals in the NPRM.

In a footnote using 1994 data, the NPRM estimates that if the station size cap were ten employees, 18.5% of the stations, and 10.4% of the employees of stations filing Form 395, would lose their EEO coverage.116/ However, this estimate was based on data

---

114/ Compare 49 U.S.C. §§44701 and 44706 (1995) (aircraft with at least 31 passenger seats) with 49 U.S.C. §40901 (1995) (smaller airplanes). See also 14 CFR §§125.1 and 125.5 (1995)).

115/ This conclusion follows whether the EEO Rule is viewed as a pro-diversity policy or a civil rights protection. Because a person's civil rights are personal to her, a person denied her civil rights derives little comfort from the assurance that others persons' civil rights continue to be protected. Like civil rights, access to diverse viewpoints is personal to each broadcast consumer. If that consumer's station of choice chooses to operate with a racist or sexist working environment which by definition stifles the germination of alternative viewpoints, a loyal listener or viewer to that station derives little comfort from the fact that other stations may operate as fair employers.

116/ NPRM, 11 FCC Rcd at 5174-75 n. 34. The NPRM's estimates are almost the same as the 1976 Commission's estimates. Nondiscrimination - 1976, 60 FCC2d at 240 ¶37 (estimating that if cap were raised to ten or fifteen "our rules would still cover those stations which employ the overwhelming majority of the industry's total workforce." The 1976 Commission also estimated that stations with more than ten employees would still be 84.9% of the total full-time workforce. Id. at 240 n. 14. However, in his dissent, Commissioner Hooks noted that because stations with fewer than five employees were already EEO-exempt, the number of exempt stations would increase to 21.3% if the cap were ten employees, and would increase to 54% if the cap were fifteen employees. Id. at 256.

generated two years before the adoption of the Telecommunications Act, which is bringing about unprecedented job consolidation. See pp. 61-65 supra. Given the superduopolization of nearly half the radio industry[117] -- soon to be the great majority of the industry[118] -- there are two reasons why the NPRM's estimate is woefully understated.

First, the distribution of employees between the station level and the corporate level in a superduopoly is quite different from the distribution of employees at standalones or AM-FM combinations. In almost no case does a standalone AM, FM, or AM-FM combination have a local "headquarters office" apart from the station operations. Headquarters employees serving these stations are located in small corporate offices of the parent company, and they typically do little of the day to day work occupying local station employees. Instead, they typically focus on such non-station matters as finance and accounting. The nature of headquarters operations may be changing with the birth of the superduopoly. An eight station combination will now support -- and often requires -- a headquarters office in the same city as the stations themselves. This local headquarters office may perform functions which cannot be rationally apportioned to a particular station -- e.g., joint sales, promotion, or programming. These functions were formerly performed at the station level by EEO-regulated employees. Since those performing them at the headquarters level are not reported on any Form 395, they enjoy no

---

117/ See p. 62 n. 69 supra.

118/ Id.

FCC EEO coverage.[119/] It follows that in a superduopoly, the reallocation of station employees to local headquarters may result in far fewer employees being reported on Form 395's -- and more stations falling under even the present five-station ownership cap. Furthermore, because the EEO-unrelated headquarters offices typically are not as race and gender integrated as broadcast stations,[120/] the persons whose jobs survive duopolization, but move to headquarters, may find themselves facing an increased risk of discrimination.

Second, even apart from the movement of employees from stations to headquarters, the distribution of employees within stations in a superduopoly may be placing some stations outside the reach of the EEO Rule even now. This trend flows directly from a basic tenet of the economics of business consolidation: the optimal allocation of resources to formerly competing firms by their new common owner is an equal allocation of resources. Thus, formerly competing stations, once under common ownership, would tend to equalize the stations' budgets and ratings -- leading, in turn, to staff sizes which are much more closely equal than they

---

119/ Thus, an AM-FM station which formerly might have employed five announcers, five salespeople, five support staff and a manager might now employ just the five announcers, two support staff and a manager. The remaining jobs would have been consolidated out of existence or moved to the local headquarters office.

120/ See p. 42, Table 3 supra.

were before becoming commonly owned.[121] If the EEO Rule's station size cap is too high, all of the superduopoly's approximately equal sized stations may well fall below the cap, giving the superduopolist a 100% exemption from the EEO Rule.[122]

121/ Because radio audiences are finite, the growth of one station's audience (and, consequently, the staff needed to service that audience) comes at the expense of its competitors. Competition between stations leads to the phenomenon of winners and losers in the war for scarce rating points. Absent common ownership of winners and losers, the winners typically have large staffs and the losers have small ones.

Until superduopolization, it was not uncommon to find a medium market AM-FM combination with an audience share of 10.0 and 30 employees, while its unsuccessful format competitor, with similar technical facilities, had a 2.0 share and ten employees. Superduopoly is changing that because a rational common ownership of both the former "winner" and the former "loser" will impose uniform management policies and capabilities at each operation in order to maximize the profits of both. Furthermore, to cut promotional costs, the stations will cooperate rather than compete, further adding to job losses at both stations. Indeed, a superduopolist faces extraordinary pressure to cut costs and staff, given the unprecedented cost of servicing the debt which resulted from the high cash flow multiples he paid to assemble the superduopoly. It follows, then, that in a well managed superduopoly consisting of four AM-FM combinations, each combination will have fewer employees, and approximately the same number of employees as its sister co-owned AM-FM combinations.

122/ This conclusion derives only from the economic consequences of combining former competitors into a single oligopoly. However, it is also possible that some superduopolists might choose to allocate employees to stations so as to bring each station below the EEO coverage cap. Such a ruse would be tempting "license renewal insurance" to many broadcasters. Nonetheless, the Commission is forced to assume that no broadcaster would artificially assign or attribute employees to particular stations within a superduopoly in order to bring some or all of the superduopolized stations below the EEO coverage cap. Even if a broadcaster were intent on attributing employees to particular stations with one motive being to minimize the extent of EEO scrutiny, the Commission couldn't do anything about it. First, it would be virtually impossible to catch a broadcaster in the act. Second, even if one were somehow caught, he would enjoy the insurmountable defense that broadcasters have almost unbridled discretion to assign employees to jobs for any rational reason. Thus, as long as he asserted some rational reason, the Commission would be foreclosed from looking to determine whether EEO avoidance was also a reason.

What will be the impact of this size-uniformity on the EEO Rule and EEO station size caps? Under one scenario, this size uniformity, coupled with the generally smaller station sizes flowing from the movement of employees from stations to headquarters operations (see p. 42, Table 3 supra), will yield a superduopoly consisting of four AM-FM combinations, each of which has approximately eight employees, supported by another ten headquarters persons. Table 6 presents this scenario.

TABLE 6

POTENTIAL IMPACT OF SUPERDUOPOLY ON EEO PROTECTION

	Employees Before Superduopoly	Employees After Superduopoly
WAAA-AM-FM	30	12
WBBB-AM-FM	15	8
WCCC-AM-FM	8	8
WDDD-AM-FM	5	8
Headquarters	0	10
Total	58	48
EEO Coverage (Cap of 5)	58	38
EEO Coverage (Cap of 10)	45	12

It is true that a few stations may never be bought by superduopolies. However, these stations will lack the market power and efficiencies of the superduopoly "station shopping malls." Most of them will wind up as the ratings losers, operating with fewer than ten employees in a struggle just to stay on the air.123/

123/ See, e.g., pp. 62-63 n. 69 supra (discussing the Denver and Orlando markets, where the non-superduopolized stations are already generally the ratings losers).

Thus, the non-superduopolized stations wouldn't be EEO-covered either. Consequently, there is a very real chance that an increase in the station cap would leave no station with EEO coverage, thereby de facto repealing the EEO Rule in many markets.

One obvious partial solution to this dilemma might be to simply declare that a superduopoly is a "station" for Form 395 and EEO Rule purposes, and that local headquarters employees must also be treated as though they are station employees. Unfortunately, that's not possible without conversion of the EEO Branch to a new computer system. Form 395, and the Commission's EEO Branch computer database, which is geared to Form 395, define a radio station only as an AM standalone, an FM standalone, or an AM-FM combination.124/ The database does not recognize any employment unit of greater size. This problem existed even before superduopolies: the EEO Branch's software treats an AM-AM-FM-FM combination (many of which were created since 1992) as two

---

124/ See Interpretive Ruling Concerning FCC Form 395-B, DA 94-553 (Chief, Mass Media Bureau, released May 27, 1994) at 3 ¶7 (allowing duopolies and LMA's to file several separate AM-FM Form 395's, and noting that "current data processing technology available to the Commission does not allow for the employment profile of more than one station to be reported on the same Form 395-B except in cases involving an AM/FM combination.") This unfortunate result is inherently at war with the Commission's policy of preferring that commonly owned and operated stations -- even if licensed to separate communities and held by different licensees -- should be treated as one unit for EEO purposes. Newport Broadcasting, Inc. (WADK/WOTB, Newport/Middletown, RI) (MO&O and NAL), 11 FCC Rcd 3624 n. 2 (1996); Alabama/Georgia Broadcast Stations, 95 FCC2d 1, 5 n. 10 (1983).

stations.[125] The problem can be solved, but in order to solve it, the Commission cannot raise the station size cap.[126]

125/ In these Comments, we refer to this problem as the "Duopoly Database Problem."

Even if the Commission upgraded its database to define a superduopoly as a single "station", the Commission would not have solved the Duopoly Database Problem. If all of a superduopolist's stations reported employment data on one consolidated Form 395, the superduopolist could escape EEO scrutiny for the entire group by hiring a few minorities and shunting them onto one station's programming staff. See Independence Broadcasting Company, 53 FCC2d 1161 (1975) ("Independence") (all of the Black employees at an AM-FM combination were assigned to the AM station). See pp. 253-256 infra.

126/ We propose a solution at pp. 321-322 infra.

C. EEO compliance does not "burden" law abiding broadcasters

1. It is offensive to suggest that civil rights compliance is a "burden"

If a highway patrol officer spoke of the drunk driving laws as a "burden" from which drinkers need "relief", she would be fired. Thus, it is disturbing that federal officials, charged with civil rights enforcement responsibilities, refer repeatedly and shamelessly to these civil rights policies and rules as a "burden" from which "relief" is somehow needed. See, e.g., NPRM, 11 FCC Rcd at 5165 ¶22.

The duty of joining in our nation's struggle to achieve full equality is among the greatest honors our system of government bestows on businesses.

This concept is not new to the Commission. Commissioner Clifford Durr raised the issue after World War II; after he left the Commission in 1948, he devoted his life to civil rights, earning a seat in history by representing Rosa Parks when she refused to give up her seat on the bus. Commissioner Kenneth Cox raised the question of discrimination in program service as early as 1960, when he served as Chief of the Broadcast Bureau. Later, Commissioners Cox and Johnson, and the Commission's General Counsel, Henry Geller, pulled the full Commission together behind the highly eloquent text of Nondiscrimination - 1968, which contained a moral clarion call to broadcasters to use the gift of the radiofrequency spectrum to heal America's malignant tumor of racism. Their work was Government at its best.

In the 1970's, an ugly cloud descended on the Commission's civil rights jurisprudence; it hovers there still. Commissioner

Benjamin Hooks saw it coming in the 1976 proceeding which almost exactly parallels this one:

> In a curious sense, it is almost inequitable to place a filing requirement only on larger stations and treat the filing requirement as if it were a penalty rather than a concomitant of a positive, affirmative national effort to alleviate the patent inequality of opportunity and experience....all licensees are public trustees and all have an equal mandate to serve the same public interest (emphasis supplied).

Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting Statement of Commissioner Benjamin L. Hooks).

Like "forced busing", "welfare queen" and "Willie Horton", the word "burden" is an unwelcome guest in the home of civil rights. Telling the regulated that the law is a "burden" does nothing to generate respect for the rule of law.

In a recent column in the Washington Post, Rashi Fein drives this point home in her discussion of a duty most people really do find to be a "burden" -- paying their income taxes:

> Burdens are by definition oppressive, and our facile use of the term in connection with our taxes thereby encourages us to do everything we can (within the law) to ease them....Our language shapes our attitudes. To weigh appropriate tax and expenditure policies is difficult when our language encourages us to think of our taxes as burdens not connected to the benefits we derive from them.

Rashi Fein, "Why Do We Call Taxes a 'Burden'"? The Washington Post, May 17, 1996, p. A-23.

Fortunately, most broadcasters, even when faced with a petition to deny, are proud to show their best side, open their books to the FCC and the public, fully disclose all the facts and tell their story. The renewal process often brings out the best in broadcasters by reminding them that they are expected to give

something back to society in exchange for the privilege of controlled access to radiofrequency spectrum. The Commission would do itself proud by adopting this positive attitude.

To start its journey back into the mainstream of civil rights jurisprudence, the Commission should remember President Kennedy's clarion call to the American people in August, 1963 when he endorsed civil rights legislation: "This is a moral issue."

2. The costs associated with EEO compliance are so slight that characterizing them as "burdensome" is sophistry

Civil rights compliance is neither expensive nor time consuming. As Commissioner Hooks has observed:

> While nobody enjoys filing papers with the government, the triennial requirement for the submission of a program - made much more simple by the Sample EEO Program here adopted - was not a notably heavy burden and symbolized an industry-wide effort as well as operating as an educational tool for the participants.

Nondiscrimination - 1976, 60 FCC2d at 256 (Dissenting Statement of Commissioner Benjamin L. Hooks).

Filling out FCC EEO forms requires little time for the average station, and almost no time for a smaller station.127/

127/ The FCC's estimates for the time required to fill out its broadcast EEO forms, as supplied to the Office of Management and Budget, are:

- Form 395: between ten minutes and one hour each year
- Form 396: one hour every eight years.

Using 40 minutes as the average time to fill out Form 395, a typical broadcaster must spend an average of 47.5 minutes per year on FCC EEO forms. This works out to less than eight seconds a day to show compliance with the only remaining diversity-promoting FCC rule.

Is this the "paperwork burden" the Commission wants to eliminate?

Day to day EEO compliance is neither difficult nor onerous. The EEO Rule requires positive recruitment of minorities and women -- but not quotas or even goals and timetables. Licensees must publicize job openings widely to generate a diverse applicant pool, but generally may use their discretion to select the best qualified candidate as long as they do not discriminate. Licensees need not hire unqualified or even "less qualified" persons. Instead, they must publicize job openings widely enough to ensure that qualified persons of many backgrounds will be aware of job openings and receive nondiscriminatory consideration. Because compliance is so simple, a licensee really has to go out of its way not to comply. In our experience, noncompliance requires so much conscious effort that it almost always masks intentional discrimination.

FCC EEO recordkeeping requirements amount to the storage of such documents as job application forms, interview forms, and letters to placement sources. The assertion that storing these documents consumes significant amounts of time is pure sophistry! These records must be maintained routinely by every station wishing to defend itself in the event of several types of litigation involving labor relations, including tort and contract claims regarding hiring, firing, promotion and termination, wage and hour complaints, overtime, workmen's compensation, accident and disability claims -- as well as lawsuits under Title VII (where

applicable) and under 42 U.S.C. §1981 (1996) (where possible).128/ As Commissioner Barrett has pointed out, broadcasters have to have personnel systems and files anyway, so the marginal cost of maintaining EEO records attendant to those systems and files is minimal.129/

Consequently, the marginal cost of maintaining records for FCC EEO purposes is zero. This fact, by itself, resolves the central issue in this proceeding.

Indeed, EEO compliance consumes even less time and effort today than it did in 1976, for three reasons.

128/ See Declaration of Eduardo Peña, Esq., former Director of Compliance of the EEOC, Exhibit 10 hereto, p. 2 n. 1.. The documents broadcasters are required to keep are similar to those they keep by the Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.1 et seq. Wards Cove underscores the value of these records for defendant's proof in a discrimination case.

In early Comments filed in this proceeding, the EEOC argues that "considering that these stations have continuing obligations to comply with the substantive requirements of the broadcast EEO rule, it may be advisable to determine whether significant effort will actually be saved by abrogating recordkeeping and filing requirements." EEOC Comments, April 24, 1996, p. 2 ("EEOC Comments"). The EEOC's well-intentioned Comments have reached the correct conclusion, although its conclusion is based on an invalid premise. If thousands of stations were exempted from the "substantive requirements of the broadcast EEO rule" then, at least theoretically, some effort could be saved by eliminating recordkeeping requirements -- but for the fact, as noted above, that the records have to be maintained anyway in the normal course of business for several other reasons.

129/ Commissioner Barrett wrote: "[s]ome have focused their criticism of the Commission's EEO rules on the alleged undue administrative burden on licensees, particularly 'small' station licensees. However, I am not convinced that this burden is necessarily 'undue'. Stations, be they 'large' or 'small', must fill vacancies as they arise. Presumably, some form of recruitment is necessary. Additionally, as we are aware, every licensee has other administrative and paperwork obligations to demonstrate compliance with other Commission regulations." NPRM, 11 FCC Rcd at 5170-71 (Separate Statement of Commissioner Andrew C. Barrett).

First, a Form 396 need be prepared only once every eight years, not once every three years. See pp. 68-69 supra.

Second, the industry has now had 25 years of experience with the Rule. See p. 60 supra.

Third, the creation of paperless office software now enables broadcasters to handle the day to day work of EEO compliance and recordkeeping automatically and at essentially zero cost, with the touch of a few buttons. See pp. 60-61 supra.

When broadcasters face license renewal every eight years, the burdens and risks associated with EEO compliance are slight, with only a very tiny handful of stations likely to receive significant sanctions.130/

Only those taking Alice in Wonderland seriously can genuinely believe that the costs and time attendant specifically to EEO compliance are excessive. The "undue burdens" claim is a classic "Big Lie."

130/ Between January 1, 1995 and March 29, 1996, there were 25 reported EEO cases. Fourteen were initial Commission decisions and eleven were decisions on reconsideration. They involved 31 licensees with licenses (including AM-FM combinations) to be renewed, and all of them were renewed without a hearing. Eighteen of the 31 licensees' stations were renewed subject to an NAL (from $2,500 to $30,000) and reporting conditions. Five were renewed subject to a short term, a NAL ($20,000 to $27,500) and reporting conditions. The total of all forfeitures combined didn't add up to an indecency fine issued against a single licensee. Of the 31 licensees' stations were renewed subject only to an admonishment, and six were renewed unconditionally.

As the Commission found in 1994, "approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions." EEO Report - 1994, 9 FCC Rcd at 6294. In the past fifteen years, only five licensees have been set for hearing with EEO issues. Nobody has ever lost a license for violation of the affirmative action component of the Rule, and only three licensees have ever been found to have been unqualified for renewal based on the nondiscrimination component of the Rule: Catoctin, 4 FCC Rcd at 2553; Walton (HDO), 54 FCC2d at 665, and King's Garden (MO&O), 34 FCC2d at 937.

3. Stronger EEO enforcement would lift two huge financial burdens on the broadcasting industry: underutilization of minority and female talent, and the suboptimal economic strength of a two-class society

Broadcasters exhibit confusion about basic economic principles when they focus on alleged "recordkeeping burdens." If they want to maximize their long term economic well being, they should understand that the full inclusion of all talented Americans in the broadcasting industry is fundamental to the industry's competitiveness and economic health.

First, goods and services can be delivered more efficiently at lower cost when the service provider does not impose irrational criteria, such as discrimination, which result in the underutilization of the potential labor supply.

Second, the social consequences of discrimination and its present effects result in a lower quality of life for everyone, including higher taxes to pay for the social consequences of unemployment and poverty.

Elimination of the economic drag of discrimination and its present effects would do more than any proposal in the NPRM to "reduce burdens" on broadcasters.131/

The Federal Glass Ceiling Commission understood this. Its Chair, Elizabeth Dole, explained that

---

131/ As we have noted, the scope of this proceeding, at least initially, was confined to proposals which would "reduce burdens" on broadcasters. See p. 3 n. 3. Proposals which would help ease a huge financial drag on the industry and the nation certainly would "reduce burdens" on broadcasters in a big way. Consequently, all of our proposals herein are well within the scope of the NPRM, as modified by the Order.

[n. 131 continued on p. 108]

> I wanted to issue a "wake-up call" to American Business, telling them in no uncertain terms that if they effectively block half their employees from reaching their full potential, they're only hurting themselves.

Glass Ceiling Environmental Scan, p. 26. The Glass Ceiling Commission reported that

> research also supports the assertion of those CEOs who say that inclusion across the board has been good for business. For example, the J.L. Kellogg Graduate School of Management at Northwestern University, reported on a 1993 study conducted by the Covenant Investment Management firm that rated the performance of the Standard and Poor's 500 on the hiring and advancement of minority men and women, and on compliance with Equal Employment Opportunity Commission and other regulatory requirements. That study then compared these ratings to the annualized return on investment on the stock of these companies over the most recent five-year period. It found that the stock market performance of the firms that had good glass ceiling records was approximately 2.4 times higher than that of the firms that had poor glass ceiling records.

Id. at 61.

131/ [continued from p. 107]

Should some broadcasters disagree, the Commission can remind them of Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987). In that case, the notice of proposed rulemaking addressed only the application eligibility rules for Docket 80-90 FM stations. In the Second Report and Order, the Commission adopted its original proposal, and also -- ab initio -- extended its holding to all new FM allotments, whether or not descended from Docket 80-90. Affirming the Commission, the Second Circuit held that the extension of the Docket 80-90 filing rules to non-Docket 80-90 FMs was consistent with the notice and comment requirements of §553 of the Adminstrative Procedure Act, 5 U.S.C. §553 (1996). Thus, even if the Commission's initial thinking in issuing the NPRM in this proceeding was how to exempt many broadcasters from the EEO Rule, the Commission may (and, for reasons discussed at pp. 155-175 infra, must) also consider proposals which ease burdens on broadcasters by reducing discrimination and its present effects.

A recent law review article did a superb job at making the case that in managing diversity, "[c]ompanies that are able to provide upward mobility, especially to middle-management and leadership positions, will have a competitive edge."132/ The article quotes Lucille Luongo, the President of AWRT, who explains that "the hiring and advance[ment of] women and minorities is good business. Media entities should view the presence of women in the workplace as criteria for success and competitiveness: affirmative action helps to guarantee fairness in media employment and, therefore, the quality of programming."133/

Unfortunately, it does not follow from the fact that "fair employment is good business" that broadcasters will automatically see the wisdom of practicing fair employment even absent regulatory requirements. If corporations always did what was in their own or

---

132/ S. Jenell Trigg, "The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Peña, 4 CommLaw Conspectus 237, 259 (Summer, 1996) ("Trigg").

133/ "The Next Step: Lucille Luongo Looks to '96 as a Time for Change," Radio World, December, 1995, p. 32, quoted in Trigg at 259.

Ms. Luongo's point concerning the "quality of programming" is worthy of special note. Radio broadcasting is a niche business. To maximize profits, a good radio broadcaster must know how to minimize the transactional costs attendant to changing from one niche to another (e.g. changing formats). Furthermore, to maintain the greatest flexibility in achieving his long term economic options, he must know how to serve each population group. That is possible only with a race and gender inclusive staff.

Broadcasters would do well to remember the experiences of the film and record businesses: once they achieved a measure of success in attracting and providing opportunity to minority talent, these industries began to enjoy financial rewards which flowed from their new-found ability to reach minority markets. That is how minorities, especially African Americans, largely "saved" the record business in the 1970's, and that is how African Americans, especially women, are "saving" the film business today.

the nation's long term best interest in matters relating to discrimination and its present effects, we would never have fought the Civil War and endured Jim Crow. Nor would the broadcasting industry, run for generations by businesspeople familiar with the laws of economics, be operating at its highest levels today as a virtually all White and all male enclave.

Even after a generation of EEO regulation, most broadcasters still do little more than minimally comply with the EEO Rule. As the Tennessee Study found, only 27% of broadcasters in Tennessee offered training and internships in 1995, and only 12% of broadcasters attended a job fair in the year before they filed their 1996 renewal applications. See p. 50 supra.

These disappointing research findings may be understood by recognizing that not all firms know that nondiscrimination serves any firm's best interests. Some firms doggedly resist learning it. Nonpecuniary factors, such as the traditional "old boy network", seem to cloud far too many firms' good judgment.

In any industry, some businesspeople are more perceptive, farsighted and capable than others. Not everyone in business is a great businessperson. Unfortunately, some of the least capable broadcasters -- those who also fail the public by providing uncreative programming and weak public service -- also fail the public with EEO noncompliance. Poor management skills seem to correlate with poor EEO performance.[134/] The reverse is also true:

134/ The filing of a petition to deny often reveals that a station manager is so disorganized that he or she couldn't even maintain retrievable personnel records. Far too often, civil rights organizations and their counsel have been "thanked" by a licensee's CEO, or by an assignee, for filing a petition to deny which unintentionally drew attention to sloppy or incompetent line management.

most of the truly gifted broadcasters also display outstanding EEO records. Although there is no regulatory cure for poor management skills, there is a regulatory cure for poor EEO performance.

How, then, does one explain why some well managed broadcasters discriminate -- indeed, why did virtually all broadcasters discriminate until perhaps 1964? The reason is that many firms find discrimination to be good business, at least in the short term, because it provides them with valuable access to business colleagues (e.g., local advertisers) and government officials who treasure the maintenance of a race and gender segregated society.

Nonetheless, even if no broadcaster discriminated, equal opportunity would not arrive overnight because additional efforts are required to remedy the present effects of past discrimination. These additional efforts never occur voluntarily on a large scale, owing to the classic "free rider problem." The free rider problem, which is best known for its control of such matters as air and water quality, explains why the long term effects of past discrimination cannot be ameliorated without governmental intervention. Voluntary efforts by any individual firm, absent equivalent efforts by all other firms, are seldom in the economic interest of the volunteering firm. The volunteering firm is simply out of pocket for its costs if other firms choose to be "free riders", enjoying the long term benefits of the volunteering firm's generosity without having to help pay for those benefits.

Thus, the history of the EEO Rule has been one of government's struggle to maintain the moral high ground and demand the best of the industry, while high minded volunteer broadcasters try to lead the way around the free rider problem. No one knows

this history better than Dr. Everett C. Parker, who is largely responsible for the birth of the EEO Rule. Dr. Parker has graciously provided us with the benefit of his four decades of observations. See Exhibit 4 hereto.

> [T]his rulemaking proceeding, like no other I have seen in forty years, threatens to lead the broadcasting industry, which I greatly respect, backward -- down the beaten path of race and gender intolerance.
>
> In 1954, I founded the Office of Communication of the United Church of Christ. The Office of Communication brought the cases in the 1950's and 1960's which desegregated the broadcasting industry, including the WLBT-TV case (Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) and Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)). The EEO Rule resulted from a Petition for Rulemaking we filed with the FCC in 1967.
>
> Currently, I teach communications at Fordham University. I also serve as an officer of the Foundation for Minority Interests in Media, which I caused to be founded, Black Citizens for A Fair Media and the Minority Media and Telecommunications Council.
>
> Having observed the industry as it faced the task of desegregation, I am greatly troubled that some broadcasters are making a profoundly ill-advised effort to convince the Commission to cut back on the scope of EEO enforcement, and that the Commission has convinced itself that cutbacks in equal opportunity efforts might "reduce burdens" on broadcasters.
>
> Anyone with a rudimentary knowledge of the American South in the pre-civil rights days knows that the absence of equal opportunity for Blacks imposed enormous economic burdens on Southern industry and inflicted great harm on the Southern economy and on the economic well being of all residents of the South.

In 1960, Atlanta and Birmingham were virtually the same size and enjoyed virtually the same gross economic output. Atlanta's Black and white business and religious leaders decided that job discrimination and the underutilization of Black workers were hurting the local economy. They fostered equal employment opportunities for Blacks and gave Atlanta the slogan "The City Too Busy To Hate."

In Birmingham, Bull Connor and his fire hoses made the city infamous. Martin Luther King called Birmingham "The Most Segregated City In America." The name stuck because it was absolutely accurate.

Atlanta is one of the most well-off, fastest growing cities in the nation. It is home to the nation's second largest airport, the Turner cable news and entertainment networks, and host to the Olympic Games. Birmingham still reaches to catch up.

I point this out because today's generation of broadcasters and FCC officials may be too young ever to have learned that it was not just moral force which broke the back of segregation in the communication industries. It was the realization that discrimination is a drag on the economy, and an impediment to both domestic and global competitiveness, that moved Presidents Eisenhower, Kennedy and Johnson to take the succession of steps which brought official segregation to its knees.

The Office of Communication of the United Church of Christ recognized that broadcasting does not just report and reflect social trends -- it sets them. Therefore, in 1967, we filed a Petition for Rulemaking urging the Commission to adopt what is now the EEO Rule.

Thanks to the leadership of Commissioners Kenneth Cox and Nicholas Johnson, and to the Commission's General Counsel, Henry Geller, our Petition was granted. In doing so, the Commission agreed with our basic premise: an integrated <u>national</u> workforce -- stimulated by the leadership of the broadcasting industry -- would serve as a powerful engine to fuel economic growth and competition, resulting in stronger market power and earnings for American companies -- <u>including</u> broadcasters.